

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 24, 2015

**Elisabeth A. Shumaker
Clerk of Court**

JAMES MARCUS FARLEY,

Petitioner,

v.

No. 14-9607

ARMY BOARD FOR CORRECTION OF
MILITARY RECORDS; SECRETARY
OF THE ARMY; SECRETARY OF THE
DEPARTMENT OF VETERANS
AFFAIRS,

Respondents.

ORDER

Before **GORSUCH, HOLMES, and MATHESON**, Circuit Judges.

James Marcus Farley petitions for review of an October 21, 2014 decision by the Army Board for Correction of Military Records (ABCMR). On October 21, 2014, the ABCMR returned to Mr. Farley without any action his second request for reconsideration of a 1996 ABCMR decision. In response to the court's order directing the parties to address this court's jurisdiction as well as the propriety of transferring the matter to another court, Respondents have moved to dismiss this petition for review for lack of jurisdiction. Mr. Farley has filed a response to the court's order as well as a response to Respondents' motion to dismiss. Upon consideration, we conclude we lack jurisdiction

to consider this petition for review, but find it in the interest of justice to transfer the matter to the United States District Court for the District of New Mexico.

The courts of appeals, like all lower federal courts, “are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute.” *Gunn v. Minton*, 133 S.Ct. 1059, 1064 (2013). “The jurisdiction of the courts of appeals to review orders rendered by administrative agencies is wholly dependent on statute.” *Noland v. United States Civil Service Commission*, 544 F.2d 333, 334 (8th Cir. 1976) (citing *American Federation of Labor v. NLRB*, 308 U.S. 401, 404 (1940) (“Such jurisdiction as [the courts of appeals have] to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review.”)). It is the burden of the party asserting jurisdiction to establish that jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Mr. Farley has not provided us with any statute that authorizes our direct review of a decision by the ABCMR and we have found none. Judicial review of an ABCMR decision is generally had by filing an action in the appropriate district court. *See Clinton v. Goldsmith*, 526 U.S. 529, 539 (1999) (noting that a servicemember can seek review of a decision by the ABCMR in district court under the Administrative Procedure Act); *Hanson v. Wyatt*, 552 F.3d 1148, 1150 (10th Cir. 2008) (considering an ABCMR decision in an appeal from district court). Accordingly, we conclude we lack jurisdiction to consider this petition for review.

When we find we lack jurisdiction, we must, if it is in the interest of justice, transfer the matter to any other court where it could have been brought at the time it was filed. 28 U.S.C. § 1631. Transfer is not automatic, however, as we must first determine whether it is in the interest of justice to do so. *See In re Cline*, 531 F.3d 1249 (10th Cir. 2008).

Respondents suggest that this matter could have been filed in the district court for either the District of New Mexico, where Mr. Farley resides, or the Eastern District of Virginia, where the ABCMR resides, but argue that it is not in the interest of justice to transfer this case because further proceedings would be futile.

Army Regulation 15-185, which sets forth procedures for processing requests for the correction of military records, provides, in part, that if a request for reconsideration is received “more than 1 year after the ABCMR’s original decision or after the ABCMR has already considered one request for reconsideration, then the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction.” 32 C.F.R. § 581.3.

On October 21, 2014, the ABCMR returned Mr. Farley’s second request for reconsideration of the 1996 decision to him without any action, stating, “The ABCMR will not consider any future requests for reconsideration of this matter. However, you have the option to seek relief in a court of appropriate jurisdiction.” Despite the passage of time, and the denial of a previous request for reconsideration, under Army Regulation 15-185, this would have been the first time the ABCMR apprised Mr. Farley of a right to

judicial review. In these circumstances, we find it in the interest of justice to transfer this matter to a court with jurisdiction to consider Mr. Farley's request for judicial review.

Accordingly, this matter is transferred to the United States District Court for the District of New Mexico. Respondents' motion to dismiss is denied as moot.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in black ink, appearing to read "Jane K. Castro", with a long horizontal flourish extending to the right.

by: Jane K. Castro
Counsel to the Clerk